

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY WEBER,

Defendant-Appellant.

UNPUBLISHED

June 25, 2009

No. 286718

Bay Circuit Court

LC No. 05-010221-FH

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant pleaded guilty to violating probation, and was sentenced to 16 to 24 months in prison. He appeals that sentence by delayed leave granted. We affirm.

Defendant argues that the trial court erred when it sentenced him to a prison term because the guidelines range of zero to six months should have resulted in the imposition of an intermediate sanction pursuant to MCL 769.34(4)(a). He contends that the trial court did not have a substantial and compelling reason to sentence him to prison. We disagree.

A court may depart from the sentencing guidelines if it has substantial and compelling reasons to do so, and states the reasons for departure on the record. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from the guidelines based on an offense or offender characteristic already considered in scoring the guidelines, unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). Factors meriting departure must be objective and verifiable, must keenly attract the court’s attention, and must be of considerable worth in determining the length of a sentence. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). To be objective and verifiable, the factors must be actions or occurrences external to the mind, and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). We review a departure from the guidelines to determine whether the sentence imposed is proportionate to the seriousness of the defendant’s conduct and his criminal history. *Babcock*, *supra* at 263 n 20, 264. See also *People v Smith*, 482 Mich 292, 298-300, 318-319; 754 NW2d 284 (2008).

The existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo, the determination that the factors constituted substantial and compelling reasons for departure is

reviewed for an abuse of discretion, and the extent of the departure is also reviewed for an abuse of discretion. *Babcock, supra* at 264-265; *Abramski, supra* at 74. In ascertaining whether the departure was proper, we defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Babcock, supra* at 270.

In this case, the trial court reasoned that defendant's continued history of probation violations justified a sentence outside the guidelines. The trial court's reason for departure was objective and verifiable. Defendant's repeated probation violations are well documented in his presentence investigation report. Defendant's history demonstrates that repeated terms of probation, jail terms, and other alternative sentencing have had no positive effect on his behavior, and have not served to curb his inability to comply with the conditions of his probation. A trial court is permitted to take into account a defendant's attitude toward his criminal behavior, his social and personal history, and his criminal history, including subsequent offenses, when imposing a sentence. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). Moreover, a defendant's conduct while on probation, including the violation itself, may serve as a substantial and compelling reason for departure. *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005). Here, defendant's history and his repeated, utter disregard for any boundaries set by the trial court or the probation department underscore his inability to conform his conduct to the rules of society, and support the trial court's decision. See *People v Hansford*, 454 Mich 320, 326; 562 NW2d 460 (1997). The extreme extent of defendant's "callous attitude toward correction and toward the trust the court has granted the probationer," *Schaafsma, supra* at 186, keenly grabs one's attention.¹

We also find that the imposed sentence is proportionate under the circumstances.

We affirm.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio

¹ We note that, in fact, the Michigan Offender Tracking Information System currently lists defendant as an absconder from parole.